U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 25 January 2005

CASE NO.: 2004-LHC-00212

OWCP NO.: 18-76563

In the Matter of

HOWARD SINGER,
Claimant,

v.

KINDER MORGAN,
Employer,

and

LIBERTY MUTUAL INSURANCE CO.,
Carrier.

Appearances:

David Utley, Esq.
For Claimant

Lisa M. Conner, Esq.
For Kinder Morgan, Inc. and Liberty Mutual Insurance Company

Before: Gerald M. Etchingham
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This case arose when Claimant, Howard Singer, filed a claim for benefits under the Longshore and Harbor Worker's Compensation Act, as amended, 33 U.S.C. Section 901 *et seq.*(the "Act"), for a traumatic injury allegedly arising out of his employment with Employer, Kinder Morgan. A formal hearing was held in Long Beach, California on May 24, 2004.

The following exhibits were admitted into evidence at hearing: Claimant's exhibits ("CX") 1-10, Employer's exhibits ("EX") 1-24 and Administrative Law Judges exhibits ("ALJX") 1-4 admitted into evidence at hearing and ALJX 5 and ALJX 6 consisting of the two closing briefs of Claimant and Employer, respectively, filed August 16, 2004, thereby closing the

record. TR at 32-36.[1] Claimant's Exhibit 10 is the deposition of Dr. Hajj and was admitted at hearing prior to it having been taken. TR at 32. The surveillance tapes offered by Employer at trial were properly authenticated as to portions relating to surveillance performed on September 18 and 19, 2003 and the part relating to Claimant's black belt exam for karate but not as to the surveillance performed on July 14 and 15, 2003.[2] TR at 58-89.

ISSUES TO BE RESOLVED

1) Whether Claimant provided timely notice to Employer that his left knee injury occurred and was work-related for purposes of Section 12 of the Act.
2) Whether Claimant filed a timely claim for benefits within the statutory period set out in Section 13 of the Act.
3) Whether Claimant aggravated, worsened or injured his left knee as a result of his employment with Employer through September 5-7, 2001 and/or as a result of the compensable right knee injury.
4) If so, whether any of Claimant's non-employment activities act as an intervening subsequent cause so as to sever the Employer's liability for injuries to the Claimant's left knee.
5) Whether Claimant is entitled to receive any temporary total disability from Employer.
6) Whether Claimant is entitled to payment of medical expenses for his left knee injury.
7) Whether Claimant is entitled to recover his attorney fees and costs.

FINDINGS OF FACT & CONCLUSIONS OF LAW

STIPULATIONS

The parties have stipulated and I find the following:

1) This matter is within the jurisdiction of the Act. TR at 36.
2) An employee/employer relationship existed at time of the alleged injury. *Id.*
3) Claimant's average weekly wage at the time of the alleged injury was $1,275.00 which would result in a compensation rate of $850.00. *Id.*
4) Claimant has not reached permanent and stationary status. TR at 37.
5) Claimant ceased working for Employer between September 5, 2001 and September 7, 2001. TR at 42.
6) On July 3, 2003, Claimant amended his previous right knee claim with the Department of Labor to include an injury to his left knee. TR at 43.
7) Claimant gave Employer notice that Claimant had injured his left knee via letter sent by Claimant's counsel to Employer's counsel on June 17, 2003. TR at 43.

Because there is substantial evidence in the record to support the foregoing stipulations, I accept them.

[1] The abbreviation "TR" refers to the hearing transcript.

[2] Employer authenticated the surveillance tape for September 18 and 19, 2003 by placing sub rosa investigator, Richard Ramirez of Horseman Investigations on the stand. TR at 51; EX 20. TR at 52. Employer withdrew the portion of the surveillance tape which followed Claimant on July 14 and 15 of 2003. TR at 54. After hearing, Employer supplied this Office with an edited version of the tape. *See* TR at 59

FINDINGS OF FACT

PROCEDURAL HISTORY

Claimant last worked for Employer between September 5 and 7 of 2001. Stip. Fact No. 5; TR at 42. Notice of Claimant's left knee claim was given to Employer on June 17, 2003, when Claimant's counsel wrote to Employer's counsel to request Employer to authorize a second opinion by Dr. Kharrazi of Dr. Hajj's recommendation that Claimant undergo left knee surgery. Stip. Fact No. 7; CX 6 at 53. Claimant filed a claim for his left knee injury on July 3, 2003, when Claimant's attorney revised the LS-203 that had previously been filed in 2001 with the Department of Labor ("DOL") OWCP Longshore Division for a work-related cumulative trauma injury to his right knee. Stip. Fact No.6; EX 16 at 233.

FACTUAL BACKGROUND

Mr. Howard Michael Singer is a 59 year old married man with a hearing impairment. TR at 61. He was deposed on August 30, 2002, April 14, 2003, September 12, 2003 and testified at the hearing on May 24, 2004. *See* TR at 60-129; EX 17.

Claimant underwent a work-related right total knee arthroplasty surgery on his right knee on September 11, 2001 which was performed by Dr. Ahmad Hajj at the Garden Grove Hospital and Medical Center in Garden Grove, California. TR at 70; EX 3 at 24. Claimant previously had arthroscopic surgery to his right knee in August of 1999, after an injury he sustained playing racquetball, and a second arthroscopic surgery on his right knee in the year 2000 after tripping over a hose[3]. TR at 93; EX 17 at 50-51. He testified that he did not notice an altered gait after the August 1999 or 2000 surgeries. TR at 93.

Claimant testified that his left knee began bothering him in 1999. TR at 67. Claimant also stated that he had experienced pain in his left knee for approximately 5 to 6 years prior to the date of his September 2003 deposition and had never had surgery on his left knee. EX 17 at 282. On January 18, 2001, Claimant had x-rays taken of both his knees and a Dr. Gurprem S. Kang remarked that the "degenerative changes of both knee joints consistent with osteoarthritis; mild to moderate narrowing of the lateral compartment on the right; mild to moderate narrowing of the medial compartment on the left." EX 3 at 23.

Claimant testified that before the right knee surgery in September of 2001 both knees hurt from arthritis but that his left knee symptoms were minimal and not bad enough to warrant surgery at that time and that he did not pay much attention to the left knee symptoms because his right knee hurt very badly. TR at 67. He also testified that he noticed that the pain in his left knee began to increase between September of 2002 and March of 2003. EX 17 at 316.

Claimant also suffered from carpal tunnel syndrome in his right wrist for which he received release surgery. TR at 68. After the third right knee surgery Claimant testified that he used a specially designed walker that had an attachment on the right side that he could rest his

[3] Unless otherwise noted, all references to the "right knee surgery" describe the September 11, 2001 total right knee arthroplasty surgery.

right forearm on so as to avoid gripping the walker with his right hand. TR at 68. Immediately after his right leg surgery Claimant testified that he was walking with the aid of a walker and limped from not being able to put much weight down on his right knee, and that he put all of his weight down on his left leg. TR at 69. Claimant testified that he used the walker for four to eight weeks. TR at 69, 70. Claimant testified that he then used a cane for about a month and still had an altered gait when he walked, placing significantly more weight on his left leg then his right. TR at 71.

Dr. Paul G. Johnson was Claimant's treating physician from approximately 1992 to at least 2002. EX 10 at 135. On June 4, 2002, at Claimant's request, Dr. Johnson drafted a letter explaining that Claimant had many serious medical problems including severe osteoarthritis in his left knee that would soon result in Claimant's left knee needing to be replaced. EX 10 at 135-6. Claimant indicated that this letter was in support of Claimant's filing for Social Security Disability and that the disability "included his left knee." TR at 111.

Claimant testified that his gait is still affected in 2004 partly because, after the right knee surgery, a bandage was tied too tightly resulting in damage to the perineal nerve in his right leg. TR at 73. Claimant testified that his right leg still hurts constantly, his right knee still feels like it is swelling, that the bottom of his foot feels like "there's a big hunk of meat in there that just goes up to [his]… big toe." TR at 73.

Claimant testified that he had been participating in country line dancing about once a week for the last 7 or 8 years except he did not go for the about a year following his right knee surgery. TR at 77, 79. Before his knees began bothering him, he would dance the entire three or four hours. TR at 79. After his surgery in 2001, he testified that he was limited to about 3 or 4 short dances and mostly socialized because the dancing hurt his knees. TR at 80. He testified that his knees always hurt even from just walking or standing. TR at 81.

Claimant obtained his seventh degree black belt in Kenpo karate, the Chinese American form of karate on April 15, 2002. TR at 82; EX 18 at 433. He had been involved in Kenpo karate for nearly 40 years and had been training under instructor Chuck Sullivan for the last 8-10 years of that time. TR at 83. Claimant testified that he practiced his karate with the instructor about once a week for two hours but that since the right knee surgery he did not attend every class and did not stay for the full two hours of many of those classes he did attend. TR at 86. After his right knee surgery, he no longer participated in freestyle sparring lessons which involved controlled contact fighting. TR at 87.

Claimant testified that in order to advance in degrees he had to pass tests where he would perform the forms and techniques required. TR at 85. He testified that he performed the required kicking in order to obtain his sixth degree black belt in 1998[4] but that since his right knee surgery he was no longer tested for mastery of the forms and techniques that involved kicking. TR at 85, 91.

He further testified that for the seventh degree black belt test on April 15, 2002, he was required to make 52 stance changes in less than three minutes and these stance changes caused

[4] Claimant obtained his sixth degree black belt on November 23, 1998. EX 18 at 436.

him pain. TR at 104. For the test, he wore a knee brace on his right knee but not his left. TR at 104. His instructor testified that Claimant had not done the kicks or most of the stances that would normally have been required for the seventh degree test but that Claimant is allowed to progress because his value goes beyond his ability to physically be able to do the moves. EX 17 at 431, 439.

Claimant testified that he has ridden motorcycles for nearly 20 years and owns a Harley Davidson which he still rides occasionally. TR at 100. Claimant testified that he works out at a gym and, prior to his third right knee surgery in 2001, was lifting two or three times a week. *Id.*

The last job Claimant held was working as a gauger or roustabout at Kinder Morgan ending around September 6, 2001,[5] a few days before Claimant underwent a total knee replacement surgery for his right knee. TR at 61.

Claimant testified that as a gauger he had to set up pipeline runs, "frequently" climb the stairs to the "big tanks" and gas tanks, gauge them, and that he also had to carry equipment up and down the stairs in order to perform this gauging of the tanks. TR at 62. The tanks are about five or six stories high. EX 17 at 393.

He testified that this job consistently involved heavy lifting, particularly of hoses that connected to the ships to head gaskets on the docks and could weigh 1,000 pounds. TR at 62-63. He mostly used a crane and dolly to move the hoses but had to sometimes physically "get over and straddle them and lift them up to connect to the pipeline," or to lift the hoses onto the dolly or sometimes to maneuver them as they hung from a hoist which could have involved lifting 100 or 200 pounds. TR at 63-64. He estimated that he often had to lift 10 to 15 pound items. TR at 62. Sometimes when a ship had to be tied to the dock, Claimant and six or seven other men would have to carry the large metal cables used to tie the ship to the cleats on the dock. TR at 63.

Claimant also testified that his work at Kinder Morgan "frequently" required him to kneel in order to clean under pipelines or to hook up a hose. TR at 65. He testified that this work "always" required him to squat, sometimes squatting and hanging over the edge of a boom boat in order to connect the booms to the ships. TR at 66. He testified that he "sometimes" had to work in awkward positions relative to his legs, especially when he was cleaning under the pipelines. TR at 66.

Claimant testified that after Dr. Hajj recommended left knee surgery for Claimant, his attorney sent a letter dated June 17, 2003 to Employer's attorney requesting authorization for a second opinion and enclosed the medical reports in which Dr. Hajj recommended the knee surgery. TR at 43.

On January 28, 2004, Dr. John P. Kelly performed a left knee arthroscopy with partial meniscectomy and chondroplasty. CX 3 at 30. The left knee operative report indicated that Dr. Kelly found an "obvious complex tear of the medial meniscus" and that the knee had progressed

[5] Both parties stipulated that Claimant ceased working at Employers between September 5 and 7 of 2001. Stip. Fact No. 5; TR at 42.

to bone on bone in places. *Id.* His post operative impression was that Claimant suffered from mild to moderate degenerative changes. EX 3 at 32.

Dr. Ahmad Hajj[6]

Dr. Ahmad Hajj is a board certified orthopedic surgeon who has practiced medicine for over twenty-five years. CX 1 at 1. He has held fellowships in hand surgery and at the Mayo Clinic in Rochester, Minnesota. *Id.* He has had a private orthopedic practice Santa Ana, California since around 1988. *Id.*

Claimant's family physician, Dr. Johnson, referred Claimant to see Dr. Hajj before January 2001. TR at 98. Dr. Hajj first saw Claimant on January 18, 2001 on a non-industrial basis in order to address Claimant's complaints concerning pain in his right knee and carpal tunnel syndrome in his right wrist. EX 19 at 464. At the time, Dr. Hajj and Claimant did not address the left knee or its work-relatedness because the right knee and carpal tunnel syndrome were the primary complaints. EX 19 at 465.

Dr. Hajj's report dated December 27, 2001, entitled Comprehensive Orthopedic Evaluation includes a detailed medical history and indicates that at that first meeting Claimant complained of chronic pain in both knees and informed Dr. Hajj that Claimant had undergone previous knee surgeries – one surgery on his left knee in January of 2000 to remove excess cartilage and a surgery on his right knee in August of 1999. EX 19 at 467. On the same report Dr. Hajj indicated under a section on "Causation/Apportionment" that he believed the Claimant's job aggravated and accelerated the Claimant's symptomology. EX 19 at 468. Dr. Hajj testified that although this statement referred to the symptomology present in both knees, he was primarily concerned with Claimant's right knee complaints. EX 19 at 468.

Dr. Hajj performed a right knee total arthroplasty, a lateral patella release and right carpal tunnel release surgery on Claimant on September 11, 2001. EX 19 at 461. The discharge summary indicates that "the patient's postoperative recovery was generally uneventful." EX 3 at 52.

Dr. Hajj examined Claimant many times following the right knee surgery: February 26, 2002, April 23, 2002, May 16, 2002, July 11, 2002, August 8, 2002, September 5, 2002, October 3, 2002, November 7, 2002, December 5, 2002, December 12, 2002, December 19, 2002, January 16, 2003, February 13, 2003, March 18, 2003, April 1, 2003, April 17, 2003, July 8, 2003, august 5, 2003, September 9, 2003, October 7, 2003, November 4, 2003 and December 9, 2003. EX 19 at 471; CX 1.

Dr. Hajj testified that Claimant's recovery from the September 11, 2001 right knee surgery was delayed due to a problem with continued pain in Claimant's right foot that Dr. Hajj believed may have been secondary to nerve compression in Claimant's right knee. EX 19 at 472.

Dr. Hajj indicates during the September 5, 2002 examination, Claimant continued complaining about complications surrounding his right knee and complained about symptoms in

[6] In the trial transcript, Dr. Hajj is improperly referred to as "Dr. Hodge."

his left knee. EX 19 at 472. Dr. Hajj testified that he knew all along that Claimant's problems with his knees stemmed in large part from arthritis. EX 19 at 473. During the November 7, 2002 examination, Dr. Hajj took x-rays which revealed Claimant suffered from unusually severe arthritis in his left knee, "not expected in somebody of his age." EX 19 at 473.

Dr. Hajj testified that the left knee problem became more pronounced after Claimant had his September 11, 2001 surgery on the right knee because Claimant was unable to walk normally on his right knee and this put more stress on his left knee. EX 19 at 460. He stated that around April of 2003, he first discussed this idea with Claimant. EX 19 at 492.

He stated in his July 7, 2003 report that

> I do believe that patient at this time has developed significant compensatory left knee pain secondary to his right knee total arthroplasty with significant limping. Although he already had pre-existing degenerative chondromalacia of the left knee, I do believe his symptoms have been accelerated significantly due to his right knee industrial injury and he has developed significant left knee pain.

EX 9 at 25.

Dr. Hajj administered a series of injections into Claimant left knee: Celestone and Lidocaine injections on March 18, 2003; Cortisone injection on July 8, 2003; Cortisone injection on August 5, 2003; Celestone and Lidocaine injections on September 9, 2003; Depomedrol and Lidocaine injections on November 4, 2003. *See* CX 1.

Dr. Hajj testified that he was not aware that Claimant line danced but knew that Claimant was involved in "playing karate" but was under the impression that Claimant had not been participating in karate since the September 11, 2001 surgery. EX 19 at 476.

Dr. Hajj admits that he is not very good at drafting reports but prefers to work off of his notes. EX 19 at 477. Dr. Hajj's March 18, 2003 notes are the first of his reports to indicate that he opined that Claimant's left knee injury was aggravated, worsened or injured by Claimant's recovery period following the right knee injury. EX 19 at 481.

Dr. Hajj currently recommends a left knee arthroplasty to replace the left knee either partially or totally. EX 19 at 485-6. He stated that all of the available medications did not alleviate Claimant's condition including injections of Synvisc, a lubricant like material and Cortisone. *Id.* He testified that Claimant would have needed left knee surgery eventually whether he had worked with Employer or not but that the employment activities aggravated and hastened this needed surgery. *Id* . Dr. Hajj stated that Claimant would need at least 6 months to rehabilitate after the left knee surgery, including 3 months of physical therapy. *Id.*

Dr. Daniel Kharrazi

Dr. Kharrazi is an orthopedic surgeon, board certified as a Qualified Medical Examiner. CX 2 at 16. He holds a fellowship in sports medicine surgery and one in adult hip and knee reconstruction. CX 2 at 15. Dr. Kharrazi did his residency at Harvard Medical School before becoming the staff orthopedic surgeon there for six months in 1997. CX 2 at 15. Claimant was examined by Dr. Kharrazi on July 7, 2003 and a report was issued on the same date. CX 2 at 19. The report indicates that Claimant related he first began developing pain in his left knee in January 2003. CX 2 at 20. Claimant related frequent pain in his left knee, on the back side of the knee and under the knee cap. *Id.* "The pain increases with walking or standing over 5 minutes, flexing and extending the knee, climbing or descending stairs. Additionally there is grinding and clicking sensation in the left knee." *Id.*

His report omits any reference that Claimant had had previous left knee surgeries. *Id.* at 21. He indicates that the exam did not reveal atrophy in the Claimant left quadriceps. Id. at 22. His diagnostic impression after the exam is that Claimant suffers from left knee degenerative chondromalacia and arthritis and that there is "compensatory left knee pain secondary to limping because of right total knee replacement."

Dr. James T. London

Dr. London first examined Claimant on February 13, 2002 but Claimant did not complain about his left knee and Dr. London observed that Claimant was walking with a right side antalgic gait. EX 24 at 6, 32. Dr. London defined an antalgic gait as "a gait where you spend less time, in the stance phase of the gait, on the one side versus the other." EX 24 at 33. He did not notice that Claimant had a left side altered gait during these visits. EX 24 at 33. Dr. London examined Claimant again on April 13, 2003, obtained x-rays of Claimant's left knee. EX 24 at 8, 32. The x-rays revealed that there was a "narrowing of medial joint space to 2 millimeters…" indicating significant loss of cartilage. EX 24 at 8. Dr. London opined that a man of Claimant's size would normally have about 7 millimeters of medial joint space. EX 24 at 8. Dr. London did not recommend surgery at that time. EX 24 at 12. Dr. London testified that the x-rays were "most consistent with what's called osteoarthritis, which is the typical granboradic (phonetic) type of arthritis that if you live long enough most of us will get in at least some of our joints" and that Claimant's condition was more than the "usual person his age, the average person." EX 24 at 9.

Dr. London testified that arthritis is primarily caused by genetics and often runs in families and is also linked to aging. EX 24 at 10. For mostly this reason Dr. London opined that active physical work did not necessarily cause the Claimant's osteoarthritis. EX 24 at 11. He stated if the left knee condition was "related to the stresses on the joints in his lower extremities, you would expect to see it in his hips and ankles; but instead we have… no symptoms referable to his hips or ankles, joints that are exposed to the same stresses as the knees." EX 24 at 15.

Dr. London saw Claimant again in October of 2003 and Claimant was now complaining of constant sharp pain in the anterior and posterior aspects of the left knee that occasionally

radiates into the left buttock. EX 24 at 13. Claimant had not complained of constant pain or a pain in the buttocks during his April 2003 examination. EX 24 at 13. Following the October 2003 examination, Dr. London agreed with Drs. Hajj and Kharrazi that Claimant needed a left total arthroplasty surgery. EX 24 at 15.

Dr. London testified that he did not however agree with Dr. Hajj and Dr. Kharrazi in their diagnosis that Claimant's left knee symptoms had been aggravated by Claimant's overcompensating for his weaker right knee following the September 11, 2001 surgery. EX 24 at 13. Dr. London testified that the right knee surgery would have actually decreased the amount of stress Claimant placed on his left knee because Claimant would have been much less active as a whole during the period he recovered from his right knee surgery and his altered gait alone was not significant. EX 24 at 14.

He testified that:

> When I say there was a decrease in his activity level, I mean he took fewer steps and went shorter distances less frequently than he would have if he hadn't had surgery on September 11, 2001. The disability imposed on him by his right knee would limit the activities placed on his left knee. The other thing is his gait was a very short-strided (sic) gait on both sides, because he had pain on both sides; and that type of gait would not aggravate his left knee. The third thing is he spent a considerable period of time using external support devices, crutches and the like, after his surgery; and he would have periods of confinement after that, that would further reduce his overall activities and take the stress off of his left knee.

EX 24 at 14

Dr. London further testified that Claimant's use of an external support device would have reduced the amount of weight he was placing on his left knee, the support leg, by about 50 percent. EX 24 at 15.

Dr. London had watched the film of Claimant taking his karate test for the seventh degree black belt and testified that those activities performed over time could aggravate the left knee arthritis. EX 24 at 17. Dr. London also testified that certain activities would aggravate osteoarthritis such as "impact loading" - jumping, cutting, running, changing directions - and "cutting" – jumping down, jumping up, resisted exercise with weights. EX 24 at 21. He testified that activities such as walking, normal stair climbing, getting in and out of a car, bending over, do not exceed the limits that arthritic cartilage can tolerate and are actually helpful to the condition. *Id.* He also testified that Claimant's activity level following the September 11, 2001 surgery may actually have helped his knee condition. EX 24 at 19. Contrary to general belief and the belief of some in the medical community, Dr. London opined that exercise stimulates cartilage much like it stimulates other living tissues to grow – muscles, tendons, bone –because cartilage is made of collagen which gets stronger when you exercise. EX 24 at 19. He also testified that exercise would not help re-grow the cartilage if there is no cartilage left or when the

joint is "bone on bone" and that in such a case, Claimant would just have to opt for surgery when he could no longer take the pain. EX 24 at 20.

Dr. London testified that when an individual aggravates the cartilage in a joint such as a knee, he would usually experience immediate pain and/or increased swelling or stiffness within the same day or next day. EX 24 at 30-31.

DISCUSSION

CREDIBILITY

I am entitled to determine the credibility of the witnesses, to weigh the evidence and draw my own inferences from it, and I am not bound to accept the opinion or theory of any particular medical examiner. *Banks v. Chicago Grain Trimmers Association, Inc.*, 390 U.S. 459 (1968); *Todd Shipyards v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *Scott v. Tug Mate, Inc.*, 22 BRBS 164, 165, 167 (1989); *Hite v. Dresser Guiberson Pumping*, 22 BRBS 87, 91 (1989). In addition, as the factfinder, I am entitled to consider all credibility inferences, and can accept any part of an expert's testimony or reject it completely. See *Avondale Shipyards, Inc. v. Kennel*, 914 F.2d 88, 91 (5th Cir. 1988)

I found Claimant less than credible with regard to his left knee pain and his reported medical histories to various physicians. For example, Claimant testified that his left knee began bothering him in 1999 and that before his right knee surgery in September 2001, he experienced pain in both of his knees. TR at 67. Claimant also testified that he had experienced pain in his left knee for approximately five to six years prior to his September 2003 deposition and that he never had surgery on his left knee. EX 17 at 282. Yet in December 2001, Claimant informed Dr. Hajj that he had undergone previous knee surgeries – one surgery on his left knee in January 2000. EX 19 at 467. Claimant even instructed Dr. Johnson to write a letter to the Social Security Administration in June 2002 in an attempt to obtain social security benefits due to, among other things, his left knee disability as Dr. Johnson opined that Claimant's left knee would soon need to be replaced. TR at 111; EX 10 at 135-36. In contrast, Claimant met with Dr. Kharazzi in July 2003 and informed him that he first began to develop pain in his left knee in January 2003. CX 2 at 20. Dr. Kharrazi's July 2003 report omits any reference that Claimant had had previous left knee surgeries. CX 2 at 21. None of Claimant's examinations with Drs. Hajj, London, or Kharrazi contained specific reference to the frequency and extent that Claimant continued to participate in country line dancing, karate, and motorcycle riding.

Based on the foregoing inconsistencies in and contradictions of Claimant's statements, I find that he was not a credible witness and accord little weight to his testimony. Similarly, I greatly discount Dr. Kharrazi's opinions concerning Claimant's left knee condition as they were based on an incomplete medical history as well as a misleading activity history concerning Claimant's ability to participate in dance, karate, and motorcycle riding. To a lesser extent, I discount the medical opinions of Dr. Hajj and Dr. London to the extent they are inconsistent with Claimant's medical history and life activities.

SECTION 12 ISSUE

The Section 12(a) Bar

It is first important to determine whether Claimant's left knee condition should be classified as an occupational injury or a traumatic accident as there is a different notice requirement under Section 12 depending upon the classification. The Act does not define what constitutes an "occupational disease" but courts have generally defined it as "any disease arising out of exposure to harmful conditions of employment, when those conditions are present in a peculiar or increased degree by comparison with employment generally." *Gencarelle v. General Dynamics Corp.*, 892 F.2d 173, 176 (2d Cir**.** 1989). Occupational diseases have a gradual onset, although the fact that a condition gradually develops does not automatically make it an occupational disease; a cumulative injury gradually developing over a long period of employment may be classified as an accident. *See Foundation Constructors, Inc. v. Director, OWCP,* 950 F.2d 621, 623 (9th Cir. 199l); *Steed v. Container Stevedoring Co.*, 25 BRBS 210, 219 (1991); *Rodriguez v. California Stevedore & Ballast Co.*, 16 BRBS 371 (1984).

Claimant did not allege that his left knee injury occurred due to work hazards present in a peculiar or increased degree at Employer by comparison with employment in general. Also the Benefits Review Board ("BRB") has stated that activities such as repeated bending, stooping, and climbing are not "peculiar to" a specific job but are common to many occupations and to life in general. *Gencarelle v. General Dynamics Corp.*, 22 BRBS 170, 173 (1989). I find that Claimant's left knee condition is a traumatic injury and therefore apply the statute of limitations located in Section 12(a) for traumatic injuries:

Section 12(a) sets out that:

> Notice of an injury or death in respect of which compensation is payable under this Act shall be given within thirty days after the date of such injury or death, or thirty days after the employee or beneficiary is aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of a relationship between the injury or death and the employment.

33 U.S.C. 912(a)

The limitation period does not commence to run until the employee reasonably believes that he has "suffered a work-related harm which would probably diminish his capacity to earn his living." *Stancil v. Massey*, 436 F.2d 274 (D.C. Cir. 1970).

Employer contends that Claimant's claim is barred because Claimant knew, or in the exercise of reasonable diligence should have known, that his left knee injury was work-related and would affect his earning capacity before June 4, 2002 and that notice to the Employer on

June 17, 2003 was therefore untimely.[7] Claimant contends that he did not need to provide notice to Employer when he developed the left knee condition because it was related to an injury for which Employer already received timely notice.

I find that Claimant, in the exercise of reasonable diligence should have known of his left knee injury, its work-relatedness and the impact that it would have on his wage earning capacity far in advance of thirty days prior to the June 17, 2003 notice provided by Claimant to Employer as set out in Section 12. His preoperative report on September 11, 2001 shows that Claimant knew his left knee was injured at that time.[8] I find that Claimant, having known that the arthritis in his right knee was work-related, should have reasonably assumed that the same condition in his left knee was work-related. Claimant listed his left knee amongst a variety of ailments he contended were disabling in Dr. Johnson's June 4, 2002 letter stating that Claimant's left knee would soon need to be replaced. See EX 10 at 135-36. I also find that Claimant should have realized that his left knee injury would impact his future earning capacity by June 4, 2002 when he instructed his family doctor to write on his behalf that his left knee would soon need to be replaced and that Claimant could not work. See EX 10 at 135-36. On December 27, 2001, Dr. Hajj concluded from his examination and from Claimant's description of his former work activities, that his job had aggravated and accelerated the symptoms, including those in his left knee. EX 19 at 481-82.

I agree with Employer and find that Claimant, in the exercise of reasonable diligence, should have been aware that his left knee injury was work-related for purposes of Section 12 by June 4, 2002. I also find that there was no excuse for Claimant's failure to give Employer timely notice of his left knee claim.

Section 12(d) Exception

Claimant did not provide formal written notice of his left knee injury until almost three months later and his claim is therefore barred by Section 12(a) unless written notice is excused under Section 12(d). Section 12(d) excuses a Claimant's lack of notice if Employer *knows* of the injury during the filing period (hereinafter referred to as the "knowledge requirement[9]") or through a finding that employer was not prejudiced by their lack of knowledge. 33 U.S.C. §912 (d).

[7] The parties stipulated that Claimant provided notice of his left knee injury to Employer on June 17, 2003 in the form of a letter from Claimant's counsel to Employer's counsel. Stip. Fact No. 7; TR at 43.

[8] The preoperative admission report states that Claimant is "a 56-year-old gentleman… known to have had traumatic arthritis in both knees for many years. He underwent prior arthroscopic debridement in both knees which gave temporary relief." EX 9 at 132.

[9] Please note the distinction between my use of the terms "notice," "awareness" and "knowledge." For example, Claimant is required to provide "notice" of his injury to the Employer under Section 12(a) within 30 days of becoming "aware" that the traumatic injury is work-related unless such notice is excused under Section 12(d) due to the Employer having "knowledge" of the work-relatedness of the injury during the filing period.

For the knowledge prong to excuse claimant's lack of notice, the BRB and courts generally require that the employer have knowledge of not only the fact of Claimant's injury but also of the work-relatedness of that injury. *Jackson v. Ramsey*, 15 BRBS 299, 303 (1983). Knowledge may be imputed on the employer if it can be shown that the employer "knows of the injury and has facts that would lead a reasonable person to conclude that compensation liability is possible so that further investigation into the matter is warranted." *Id.* at 303. *See Kulick v. Continental Baking Corp.*, 19 BRBS 115 (1986).

Employer knew in 2001 that Claimant alleged his arthritic right knee was injured and/or aggravated by work activities.[10] Employer also knew that Claimant suffered a similar arthritic condition in his left knee, as is shown in the September 11, 2001 preoperative admission report by Dr. Hajj. However, the record does not prove that Employer knew or should have known that Claimant's left knee injury was caused or aggravated by work or the work-related right knee injury. I cannot determine if and when Employer received Dr. Hajj's December 27, 2001 report or Dr. Johnson's June 4, 2002 letter, either of which could have possibly led a reasonable person to conclude that investigation into the left knee was warranted. Without evidence that the employer knew anything that would suggest the left knee injury was work-related, I cannot find that the Claimant's lack of notice is excused under the knowledge prong of Section 12. I therefore find that Claimant's lack of notice was not excused due to Employer's "knowledge" of the injury within the statutory period.

Claimant alleged that he did not need to provide separate notice to Employer about the left knee injury because it grew out of the same injurious conditions as the right knee and/or was aggravated by an altered gait that Claimant suffered due to properly noticed right knee injury. Claimant relies primarily on two cases to support the contention that a claimant does not need to provide notice of each and every injury that grows out of a timely noticed injury.

I find that Claimant's reliance on *Alexander v. Ryan Walsh Stevedoring,* 23 BRBS 185, 187 (1990), *vacated and remanded* on other grounds, 927 F.2d 599 (5th Cir. 1991), is misplaced. In the *Alexander* case, the BRB precluded the employer from asserting any Section 12 defense due to the distinguishing fact of employer's failure to raise this defense in the first hearing before the Administrative Law Judge. *Alexander v. Ryan Walsh Stevedoring*, 23 BRBS supra at 187. Here, Employer has raised a timely Section 12 defense before me at hearing.

Claimant also relies on *Thompson v. Lockheed Shipbuilding & Construction* 21 BRBS 94 (1988). In *Thompson*, the claimant gave proper notice to the employer of an accident and resulting ankle injury. *Id.* Claimant had ankle surgery and subsequently developed a lower back problem while recovering from the surgery. *Id.* The ALJ found that the claimant's lower back problem was caused by claimant's ankle surgery. *Id.* The BRB affirmed the ALJ's finding that the Claimant had given timely notice of his ankle, that the back injury arose out of the ankle injury and therefore no separate notice of the back injury was necessary as "his back condition… did not arise from a separate accident." *Id.*at 96. According to the BRB in *Thompson*, one of the main reasons they were willing to find that notice of the first injury was sufficient for the second

[10] I can infer that Employer knew the right knee injury was alleged to be work-related by Claimant having filed a timely claim for benefits due to the right knee injury and subsequently receiving benefits for the right knee condition.

injury was that employer would have been able to investigate the "circumstances surrounding claimant's accidental injury." 21 BRBS at 96. Outside of that one comment, the BRB in *Thompson* did not explain why it found that notice was excused under the circumstances they did, however, cite two cases in support of their finding. An analysis of these cases can help explain the reasoning behind the *Thompson* decision.

The first case cited in *Thompson* is *Long v. Director, OWCP*, 767 F.2d 1578, 17 BRBS 149, 152 (9th Cir. 1985). *Long* does not specifically address the notice issue and instead held that claimant may not receive scheduled benefits for impairment to limbs as a direct result of the prior injury to an unscheduled portion of the body, the back. *Long v. Director, OWCP*, 767 F.2d 1578, 1583. The case does show that there are circumstances where an additional injury that is found to have grown out of a properly noticed work injury or accident would not need separate notice. However, the case does not provide what these circumstances are as it does not discuss the notice issue.

The second case, *Jackson v. Ingalls Shipbuilding Division*, 15 BRBS 299 (1983) addresses the notice issue and excuses the claimant from having to give separate notice because claimant was able to show that employer had *knowledge* of the facts surrounding the injury or death through the claimant's timely filing for the first injury. Id. at 299-305. This indicates that the BRB in *Thompson*, although not expressly stating such, was actually excusing the claimant's lack of notice under the knowledge prong of Section 12(d). Seen in this context, the Claimant, by citing these cases, is essentially arguing that the Employer had "knowledge" of the work-related injury. I have found above that the Employer did not have knowledge of the work-relatedness of the left knee injury during the filing period within 30 days of June 17, 2003, and therefore find that Claimant's argument is incorrect.

Section 12(d) will also excuse Claimant where the lack of notice does not prejudice the Employer. 33 U.S.C. §912(d). Prejudice can be established if an employer can show that, due to a claimant's failure to provide the written notice required by subdivisions 12(a) and (b), it has been unable to effectively investigate the nature and extent of the alleged illness or to provide medical services. *Steed v. Container Stevedoring Co.*, 25 BRBS 210 (1991) (employer had 7.5 months before the hearing to arrange for an independent medical exam; additionally, the employer had access to medical records fully documenting the nature and extent of claimant's injury). Most courts have held that it is the Employer's burden to show that they were prejudiced. *See Cox v. Brady-Hamilton Stevedore Co.*, 25 BRBS 203 (1991); *Shaller v. Cramp Shipbuilding & Dry Dock Co.*, 23 BRBS 140 (1989); *Bivens v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 233 (1990); *Kashuba v. Legion Insurance Co.*, 139 F.3d 1273 (9th Cir. 1998), cert. denied 525 U.S. 1102 (1999). Evidence that lack of timely notice did impede the employer's ability to determine the nature and extent of the injury or illness or to provide medical services is sufficient; a conclusory allegation of prejudice is not. *Kashuba v. Legion Insurance Co.*, 139 F.3d 1273 (9th Cir. 1998); *see also ITO Corp. of Baltimore v. Director, OWCP* , 883 F.2d 422, 22 BRBS 126 (CRT) (5th Cir. 1989), (finding that the determination by the ALJ and Board that the employer was not prejudiced by the lack of timely notice was supported by substantial evidence as the only suggestion of prejudice the employer advanced was a general one of "no opportunity to investigate the claim when it was fresh."

Employer relied primarily on two cases in support of their contention that hey suffered prejudice due to Claimant's late notice. Employer cited *Kashuba v. Legion Insurance Co.,* 139 F.3d 1273 (9th Cir. 1998), cert. denied 525 U.S. 1102 (1999). In *Kashuba*, Employer received notice of the claim four months after an accident allegedly occurred injuring his back and nearly six weeks after claimant had undergone back surgery. *See id.* There were questions about whether the accident actually occurred and, if it did, whether it occurred while Claimant was employed with the Employer. *Id.* The BRB also noted that had the employer been notified of Kashuba's injury earlier, it may have been able to produce specific and comprehensive evidence it needed to sever the presumed connection between Kashuba's back injury and his employment. Id. at 1276; (citations omitted).

In contrast, the Claimant here gave notice to Employer before having surgery – in fact the notice was in the form of a request for a second opinion of a doctor's recommendation that the Claimant have left knee surgery – so Employer was not prejudiced by their not having time to get a second opinion prior to surgery. Also there are no credibility problems concerning whether the activities that are purported to have caused Claimant's left knee injury actually occurred.[11] However, Claimant's lack of notice did preclude Employer from collecting "specific and comprehensive evidence" which might have shown that Claimant's left knee condition was not caused by his work activities or his altered gait following the September 11, 2001 right knee surgery.

Employer here alleged they were prejudiced because Claimant left their employ in September 2001 and did not provide notice of the injury to the Employer until June of 2003. TR at 47. Employer alleged that they were unable to monitor any changes in Mr. Singer's left knee, obtain MRI films, test the fluid in the knee, or perform exploratory surgery during this time. TR at 47. Employer alleged they could not ascertain what percentage of Claimant's left knee condition was work-related and what percentage was due to Claimant's activities subsequent to leaving their employ. TR at 48. I find this last point to be especially persuasive as many of Claimant's activities after the right knee surgery could have been intervening causes had Employer had the chance to investigate the left knee injury and monitor it during this time.

For instance Claimant enjoyed line dancing. He testified that he stopped line dancing prior to his September 11, 2001 right knee surgery and that he started line dancing again in September of 2002, nine months prior to providing notice to Employer. TR at 77,79. He testified that he danced about 3 or 4 short dances each week and mostly socialized. TR at 80. However, he also testified that his knees hurt following the nights he went line dancing during this period of time. TR at 80. I find that Employer was prejudiced by not being able to monitor the effect that this activity had on Claimant's left knee at this time.

During this time, Claimant practiced Kenpo karate with his instructor about once a week for about two hours per session. TR at 86. He testified that he did not attend every class and often did not stay for the full two hours when he did attend. TR at 86. His instructor testified that Claimant did not do all of the kicks or stances that normally would have been required to pass the seventh degree black belt test. EX 17 at 431, 439. However, Claimant was not a passive

[11] There are contrary reports as to how these work activities affected Claimant's knee but both parties seem to generally agree on what activities Claimant performed at work.

observer. I watched the tape of his seventh degree black belt test and although he did not do full kicks, he did make many stance changes that I observed could have aggravated his left knee condition. EX 21. Also the test was complicated and Claimant must have practiced many hours in order to pass it. EX 21. I find that Employer was prejudiced by not having been able to monitor Claimant's left knee to determine the impact that karate had on it.

Claimant testified that he has ridden motorcycles for nearly 20 years and owns a Harley Davidson which he rode occasionally during this time. TR at 100. I find that Employer was prejudiced by not having been able to monitor Claimant's left knee condition to see if the riding aggravated Claimant's knee.

In essence, any one of the above-mentioned activities could have been responsible for aggravating Claimant's left knee instead of his employment activities or the altered gait following his right knee surgery on September 11, 2001. See EX 24 at 17, 21. Any one of the activities could be an intervening cause severing causation. It is well settled that a subsequent injury or aggravation which is not a natural or unavoidable result of the work injury, but is instead the result of an intervening cause such as the employee's intentional or negligent conduct, will relieve the employer of liability attributable to the subsequent injury. *Bludworth Shipyard v. Lira*, 700 F.2d 1046, 15 BRBS 120 (CRT) (5th Cir. 1983); *Cyr v. Crescent Wharf & Warehouse Co.*, 211 F.2d 454 (9th Cir. 1954); *Grumbley v. Eastern Associated Terminals Co.*, 9 BRBS 650 (1979).

In support, Employer also cited *Addison v. Ryan-Walsh Stevedoring, Co.*, 22 BRBS 21 (1989) which involved a claimant who had immediately informed his employer of an industrial accident but had subsequently certified on his group health insurance form that his back injury was not work-related. Id. at 35. The BRB addressed what they deemed as the "novel issue" of whether claimant's failure was excused where "employer knows that claimant has suffered a work-related accident which has resulted in injury but does not have knowledge of the particular bodily injury for which compensation is being sought." *Id.* at 34. The BRB found that lack of notice was not excused under the knowledge requirement as the "Board and the Courts have recognized that the Section 12(d) knowledge requirement is precluded where claimant has previously certified on his group health insurance form that his injury was not work-related." *Id.* at 35 (citations omitted). The BRB in *Addison* also affirmed the ALJ's finding that the employer was prejudiced by lack of knowledge as more then two years passed between the actual date of accident and notice to the employer that claimant had an injured back. *Id.* at 35.

The facts of *Addision* are similar to those in the present case. Employer here knew of the cumulative trauma that Claimant suffered at work as is shown by the claim Claimant submitted for his right knee injury. Employer knew Claimant had osteoarthritis in both knees and could have reasonably assumed that Claimant would have included his left knee injury in the claim if it had been work-related. Claimant waited over two years before adding his left knee to the claim for his right knee injury. Claimant waited almost one year from the date that I find he was aware that his left knee was work-related. Between the date that Claimant last worked and the June 2003 date that he provided Employer with notice of Claimant's left knee injury, Claimant performed several non-work-related activities that likely amount to intervening causes for Claimant's left knee problem.

For all of the reasons above, I find that Claimant did not provide timely notice as required by Section 12(a) and that Section 12(d) does not excuse Claimant's lack of notice. Since I have found that the left knee claim is time-barred, I need not address Claimant's other arguments related to entitlement to compensation.

SECTION 13 ISSUE

Alternatively, Claimant has the burden of establishing the elements of Section 13. *George v. Lykes Bros.*, 7 BRBS 877 (1978). Section 13 must be read in conjunction with Sections 30(a) and 30(f) of the LHWCA. *Wendler v. American Nat'l Red Cross*, 23 BRBS 408 (1989). Section 30(a) requires that an employer submit to the Secretary of Labor a report of a claimant's injury within ten days of the date it has knowledge of that injury. 33 U.S.C. 930(a). Section 30(f) tolls the filing period under Section 13 until the employer complies with the requirements of Section 30(a). *See Bustillo v. Southwest Marine, Inc.*, 33 BRBS 15 (1999); *Nelson v. Stevens Shipping & Terminal Co.*, 25 BRBS 277 (1992); *Ryan v. Alaska Constructors, Inc.*, 24 BRBS 65 (1990). However Section 30(f) of the LHWCA does not toll the limitations period of Section 13(a) if Employer was not given notice of the work-relatedness of the injury. *Stark v. Washington Star Co.*, 833 F.2d 1025, 20 BRBS 40 (CRT) (D.C. Cir. 1987),

The question of whether a claim was timely filed under Section 13 relates to when the Claimant knew, or had reason to know, that his injury was likely to impair his earning capacity – merely seeking treatment, experiencing pain, or knowing of a possible future need for surgery, is legally insufficient to trigger the running of the one-year limitations period. *Newport News Shipbuilding & Dry Dock Co. v. Parker,* 935 F.2d 20 (4th Cir. 1991). This so called "awareness standard" is the same for Section 12 and Section 13. *Bivens v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 233 (1990). My finding that Claimant, in the exercise of reasonable diligence, should have become aware that his left knee injury was work-related and disabling on June 4, 2002 is controlling for Section 13 also. As such, Claimant's filing of a claim on July 3, 2003 was outside the one year statutory period for Section 13.

However the record does not indicate that Employer ever complied with Section 30(a) through filing a report of Claimant's injury to the Department of Labor. Therefore, I find the statute in Section 13 was tolled under Section 30(f) as explained above and that the Claimant's claim is not barred under Section 13.

CAUSATION

Although I find that the Claimant's claim for disability compensation is time barred by Section 12, I must still address causation because a claim for medical benefits is never time-barred. *Colburn v. General Dynamics Corp.*, 21 BRBS 219, 222 (1988); *Mayfield v. Atlantic & Gulf Stevedores*, 16 BRBS 228 (1984); *Winston v. Ingalls Shipbuilding*, *Inc*. 16 BRBS 168 (1984). Employer has a continuing obligation to pay an injured employee's medical expenses, even if the employee no longer works for the employer or the claim is time-barred by Section 12 or 13. *Strachan Shipping Co. v. Hollis*, 460 F.2d 1108 (5th Cir.), cert. denied, 409 U.S. 887 (1972); *Wilson v. Southern Stevedore Co.*, 1 BRBS 123 (1974), *Todd Shipyards Corp. v. Black*,

717 F.2d 1280, 16 BRBS 13 (CRT) (9th Cir. 1983), *aff'g* 13 BRBS 682 (1981), cert. denied, 466 U.S. 937 (1984).

If a claimant sustains an injury at work which is followed by a subsequent injury or aggravation outside work, the employer is liable for the entire disability and for medical expenses due to both injuries if the subsequent injury is the natural consequence or unavoidable result of the original work injury. *Lewis v. Norfolk Shipbuilding and Dry Dock Co.*, 20 BRBS 127 (1987); *Pakech v. Atlantic & Gulf Stevedores, Inc.*, 12 BRBS 47 (1980). Claimant contends that his left knee injury was caused, accelerated, or aggravated by his employment activities with Employer and/or due to his altered gait following his work-related right knee arthroplasty surgery. In contrast, Employer contends that Claimant's left knee condition was not caused or aggravated by his work activities or by his recovery from the right knee surgery. In the alternative, Employer contends Claimant's dancing, karate and/or motorcycle riding was an intervening cause severing their liability for the left knee injury.

Section 20(a) Presumption Has Been Invoked

In determining whether an injury is work-related, the Claimant is aided by the Section 20(a) presumption if he can establish a prima facie case; i.e. that he suffered a harm and conditions existed or a work accident occurred which could have caused the harm. *See U.S Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 6312 (1982); *Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59 (CRT)(5th Cir. 1998). Under *Brown v. I.T.T./Continental Baking Co.*, 921 F.2d 289, 296 n.6 (D.C. Cir. 1990), Claimant need not prove the pre-requisites by a preponderance of the evidence but need only show "some evidence tending to establish" those pre-requisites.

It is undisputed that Claimant suffers from osteoarthritis in his left knee, thereby establishing that he suffered a harm. Claimant asserts that his left knee injury was aggravated by work activities with Kinder Morgan and/or grew out of a compensable work-related right knee injury and surgery.

The evidence tends to establish that Claimant was exposed to conditions which may have aggravated his left knee condition while employed with Kinder Morgan. Claimant was employed with Kinder Morgan from 1990 to 2001 and testified that the pain in his left knee began sometime between 1997 and 1999. EX 17 at 282; TR at 67. According to Dr. London, osteoarthritis could be aggravated by certain activities such as jumping, running, changing directions or resistance exercise with weights. EX 24 at 10, 21. Claimant testified that his work activities involved climbing, kneeling and squatting which are all activities that would place strain on ones knees similar to weight resistance training or changing directions. Lastly, Dr. Hajj indicated in December of 2001, that Claimant's work activities with Employer aggravated Claimant's osteoarthritis in his knees. EX 19 at 14-15.

The evidence also tends to establish that Claimant's left knee condition was aggravated during recovery from the September 11, 2001 surgery to correct his work-related right knee injury. Claimant had a carpal tunnel release surgery on his right wrist contemporaneously with the September 11, 2001 right knee total arthroplasty surgery. TR at 68. Following the right knee

surgery, Claimant was unable to place much if any weight on his right knee and had to use a walker which was specially designed with an extension on the right arm pad to accommodate his post-surgery right hand. TR at 68. He testified that he placed almost all of his weight on his left leg for this period. TR at 69. He testified that he used a cane for about a month following the walker and suffered from an altered gait that he retains to this day. TR 71, 73. His altered gait and testimony concerning how he relies more heavily on his left leg tends to establish that his left knee injury was at least partly aggravated or caused by his right knee injury. See EX 9 at 25; EX 19 at 460, 492; CX 2 at 19-22. This is enough to support a prima facie showing and invoke the Section 20(a) presumption.

Employer Has Rebutted Section 20(a) Presumption

Once a claimant has invoked the presumption, the burden shifts to the employer to rebut it with substantial countervailing evidence. *Peterson v. General Dynamics Corp.*, 25 BRBS 14 (CRT) (2d Cir. 1992), cert. denied, 507 U.S. 909 (1993); *Davison v. Bender Shipbuilding & Repair Co.*, Inc., 30 BRBS 45, 46-47 (1996). When a doctor's testimony and reports unequivocally state his opinion, rendered within a reasonable degree of medical certainty that the claimant's condition is not work-related, employer has produced evidence sufficient to sever the causal relationship between claimant's employment and his harm. *O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39, 41 (2000). The doctor does not need to "rule out" all other causes or give his opinion with "absolute certainty." *Id.* at 42.

Employer relies primarily upon the medical testimony of Dr. London to rebut Claimant's claims that the left knee injury was linked to 1) the work activities at Kinder Morgan; or 2) to Claimant's recovery from the compensable right knee injury and surgery.

Regarding whether the work activities caused or aggravated Claimant's left knee conditions, Dr. London testified that he could state to a reasonable degree of medical certainty, that Claimant's work activities with Employer did not *cause* the osteoarthritis in Claimant's left knee. EX 24 at 11-12. However, this does not rebut whether the work activities *aggravated or accelerated* Claimant's left knee condition. Under the "aggravation rule," an employer is liable for the claimant's entire resulting disability when an employment-related injury contributes to, combines with, or aggravates a pre-existing disease or underlying condition. *Strachan Shipping Co. v. Nash*, 782 F.2d 513, 517, 18 BRBS 45 (CRT) (5th Cir. 1986) (en banc).

Dr. London did address the aggravation issue in his October 11, 2003 report where he stated that Claimant "did not start to complain of symptoms referable to his left knee until long after he worked for Kinder Morgan. In my [Dr. London's] opinion, if he had aggravated, worsened or injured his left knee while he was working at Kinder Morgan he would have complained of symptoms to both knees." EX 4 at 96. He testified that he would expect to usually see an increase in pain, swelling, stiffness and limitation of motion if the left knee condition had aggravated. EX 24 at 22. He testified that Claimant had not complained that he suffered these symptoms in his left knee while he was employed with Kinder Morgan. EX 24 at 39-40.

He testified that most osteoarthritis is caused by genetics. EX 24 at 10. Dr. London was familiar with Claimants work activities which he described as "active physical work" involving lifting, carrying, climbing, squatting, and working in awkward positions. *Id.* Dr. London testified that this active physical work would have caused stress in Claimant's hips and ankles and that had the stress been the cause of the osteoarthritis, then he would have anticipated similar injuries to Claimant's hips and ankles. EX 24 at 12. Dr. London testified that the stress in the hip joints would actually have been greater, in pounds per square inch than in the knee joint and therefore that had the left knee injury been caused by stress from the active physical work, he would have expected a similar condition in Claimant's hip joint. EX at 15-16.

Dr. London testified that arthritis is primarily caused by genetics and often runs in families and is also linked to aging. EX 24 at 10. For mostly this reason Dr. London opined that active physical work did not necessarily cause the Claimant's osteoarthritis. EX 24 at 11. He stated if the left knee condition was "related to the stresses on the joints in his lower extremities, you would expect to see it in his hips and ankles; but instead we have… no symptoms referable to his hips or ankles, joints that are exposed to the same stresses as the knees." EX 24 at 15.

Dr. London saw Claimant again in October of 2003 and Claimant was complaining of constant sharp pain in the anterior and posterior aspects of the left knee that occasionally radiated into the left buttock. EX 24 at 13. Claimant had not complained of constant pain or a pain in the buttocks during his April 2003 examination. EX 24 at 13. Following the October 2003 examination, Dr. London agreed with Drs. Hajj and Kharrazi that Claimant needed a left total arthroplasty surgery. EX 24 at 15.

I find that Dr. London's testimony and medical records are adequate to rebut the Section 20(a) presumption as it relates to the left knee condition being caused by Claimant's work activities.

As to whether Claimant's left knee injury was caused or aggravated by the altered gait following the September 11, 2001 surgery, Dr. London testified that during the time period that Claimant was using a walker, his left knee was probably subjected to significantly less stress because Claimant placed almost 50% of his weight on the walker. EX 24 at 14. He also opined that Claimant was less active after the surgery and thereby used his left knee less then before the surgery. EX 24 at 14. Dr. London felt that Claimant's altered gait was very "short strided" and that such a short gait would not have aggravated his left knee. *Id.*

I find that this testimony is sufficient to rebut the Section 20(a) presumption in regards to whether Claimant's left knee condition was caused or aggravated by his recovering from the right knee surgery.

Weighing the Evidence

Since the Employer has successfully rebutted the Section 20(a) presumption of causation, the factual question of causation "must be resolved upon the whole body of proof pro and con." *Del Vecchio v. Bowers*, 296 U.S. 280, 286-87, 56 S. Ct. 190, 193 (1935). I will first address

whether Claimant's activities while employed with Employer aggravated or accelerated Claimant's left knee condition.

Dr. London testified that activities such as "where you jump or you come down hard on your leg, things where you do sudden resistance to your knee like rapid forceful lifting of weights" can aggravate an underlying osteoarthritic condition. EX 24 at 28. He referred to these types of activities as "impact loading." EX 24 at 31. He admitted that many of Claimant's work activities with Kinder Morgan had the potential to aggravate Claimant's left knee condition and that they had in fact aggravated the osteoarthritic condition in his right knee. *Id.*

Dr. London's opinion that, unlike the right knee condition, the left knee condition was not aggravated by Claimant's employment with Kinder Morgan was based on two premises: 1) that if the left knee condition was caused by stress from work activities, Dr. London would have expected to have seen similar problems with Claimant's ankles and hips; and 2) that if the work activities had aggravated Claimant's left knee injury then he would have expected to have seen an immediate increase in symptomology and complaints related to the aggravation. I find neither of these arguments to be very persuasive for the reasons set out below.

Dr. London's claim that one would expect to see injuries to Claimant's ankles and hips if the left knee condition was caused by work activities is seemingly contradicted by Dr. London's own March 13, 2002 report. *See* EX 3. In this report, Dr. London stated that Claimant's osteoarthritis in his right knee *was aggravated* by Claimant's work activities absent any complaints by Claimant of ankle or hip pain in relation to his right knee. *Id.* Dr. London does not offer a sufficient explanation for this discrepancy and I therefore do not afford his opinion much weight regarding the importance of hip and ankle symptoms in relation to his left knee condition.

Dr. London's second assertion is that if Claimant had aggravated his left knee condition, Dr. London would have expected immediate symptoms such as pain, swelling or stiffness. EX 24 at 32. He testified that Claimant never complained of an increase in left knee pain, stiffness or swelling that was caused by his work activities and therefore the left knee condition must have never been aggravated during this time. However, Dr. London saw Claimant for the first time five months after Claimant had ceased working for Kinder Morgan.[12] EX 24 at 5. At that time, it is not only conceivable but probable that Claimant would have been more concerned with recovering from his right knee surgery than relating whether his left knee symptoms had grown worse during certain periods in the past versus other periods. Dr. London's report dated March 13, 2002 described the first examination and Dr. London does not indicate that he spoke with Claimant specifically about the continuity of his left knee symptoms while Claimant was employed with Employer. EX 3 at 29. This could indicate that Claimant was not asked whether his left knee symptoms progressed during the period he had worked with Employer. I place little weight on Dr. London's findings that Claimant never complained of left knee symptoms while working at Employer.

In contrast, there is substantial evidence that Claimant's left knee did in fact grow worse while he was employed with Employer. Claimant indicated that the pain in his left knee "began"

[12] February 13, 2002.

while he was employed with Employer in 1999. TR at 167. Medical records reveal Claimant sought treatment for both knees on many occasions while he was employed as is shown below.

On July 17, 2000, Dr. B. Ted Field noted that Claimant said "both knees" felt very good after the series of Synvisc injections. EX 3 at 38. Likewise, on January 18, 2001, both of Claimant's knees were x-rayed by Dr. Gurpem S. Kang at the request of Dr. Hajj due to concerns Dr. Hajj had about both knees. EX 3 at 46; CX 10 at 16. Dr. Kang concluded that there were "[d]egenerative changes in both knee joints consistent with osteoarthritis. Right knee shows mild to moderate narrowing of the lateral compartment. Left knee shows mild to moderate narrowing of the medial compartment." Id.

In February and April of 2001, Dr. Hajj administered Synvisc injections in both of Claimant's knees due to Claimant complaining of pain in his knees. CX 8 at 65.

Dr. Hajj's December 27, 2001 report refers to two prior surgeries that Claimant had had on his knees; "the first surgery was on the right knee in August of 1999 and the second surgery was on the left knee in January of 2000." EX 3 at 42.

In the September 11, 2001, admission records, Dr. Hajj noted that Claimant was "a 56-year-old gentleman who is known to have had traumatic arthritis in both knees for many years. He underwent previous debridement of both knees which gave temporary relief." EX 9 at 132.

Claimant began complaining about his left knee during the time he worked at Kinder Morgan. In contrast to Dr. London, Drs. Hajj and Kharrazi opine that Claimant's left knee condition was aggravated by his work activities while with Employer. EX 19 at 468, 485-86.

Dr. Hajj first examined Claimant while he was still working with Employer, later testifying that Claimant's left knee condition was aggravated by his work activities while with Employer. CX 10 at 6. He stated that "the nature of the work he was doing, the activities he had to do at work had caused more stress on his knees, and that's what contributes to arthritis." *Id*. Dr. Hajj testified that most activities aggravate arthritis including simple walking, sitting and standing. CX 10 at 20.

The weight Dr. Hajj's opinion carries is somewhat lessened by the fact that he only concluded in writing that Claimant's left knee condition was related to his work activities after the time that Claimant had ceased working for Employer. CX 10 at 59. Dr. Hajj admitted that he had not formed an opinion concerning causation of the left knee injury at the time he was examining Claimant in January of 2001. CX 10 at 59. But Dr. Hajj had formed the opinion that the osteoarthritis in the right knee was work-related in January of 2001 and explains that no one had asked him about the left knee at the time. CX 10 at 59. I believe Dr. Hajj when he says that had he been asked in January 2001 whether the left knee injury was work-related, he would have said yes because Claimant basically had the same problem in both knees. CX 10 at 59.

Dr. Kharrazi also stated that Claimant's left knee condition was aggravated by his work activities while at Kinder Morgan. CX 2 at 26. In his July 7, 2003 report he indicated that he understood the physical requirements of Claimant's former job at Kinder Morgan to include

prolonged standing, bending, stooping, climbing and descending tanks, repetitive movement of the upper/lower extremities, lifting and carrying objects weighing up to 150lbs. CX 2 at 20. These activities are consistent with the job activities that Claimant testified to performing. *See* Summary of Facts; *see also* TR at 62; EX 17 at 393.

Lastly Dr. London testified that Claimant's left knee condition as of April 2003 was not something that would have developed overnight or even over one or two years. EX 24 at 25. He believed that it was likely that the left knee condition began five to seven years prior to that date. *Id.* This testimony by Dr. London would further indicate that Claimant's knee probably started deteriorating during the time he was working with the Employer.

After weighing all relevant evidence, I find that there is substantial evidence to indicate that the left knee condition was aggravated by Claimant's employment activities with Employer prior to his last day of employment in September of 2001.

Next, I address whether the left knee injury grew naturally out of the right knee injury and altered gait following the September 11, 2001 surgery to Claimant's right knee.

Following the September 11, 2001 surgery, Dr. Hajj examined Claimant approximately twenty-three times. EX 9 at 25. Dr. Hajj testified that Claimant's left knee condition was aggravated by his "right knee total arthroplasty with significant limping." EX 9 at 25. He testified that the symptoms in the left knee became more pronounced following Claimant's September 11, 2001 surgery "due to Claimant not being able to place normal weight on his right knee resulting in greater weight and stress upon Claimant's left knee." EX 19 at 460. Dr. Hajj also testified that the altered gait "accelerated the timing of a need for surgery on [Claimant's]… left knee." EX 19 at 495.

However, Dr. Hajj did not discuss a potential causal link between Claimant's right knee surgery and his left knee condition until March 18, 2003. EX 19 at 481. Additionally, Dr. Hajj testified that he was not aware that Claimant participated in strenuous activities such as karate following the September 11, 2001 surgery. EX 19 at 476. He stated that had he known Claimant was involved in karate, "that would of course maybe change my opinion about what could have caused his left knee pain." *Id.* I find Dr. Hajj's opinion that the left knee was caused by the altered gait due to the right knee surgery not very credible due to its not being offered until 2003 and due to his lack of knowledge of Claimant's post-September 11, 2001 activities.

Not until July 7, 2003, did Dr. Kharrazi conclude that Claimant's left knee had been aggravated by his altered gait following the right knee surgery: He stated in his report on that date that:

> The patient has had a right total knee arthroplasty for an industrial injury to his right knee. I do believe that the patient at this time has developed significant compensatory left knee pain secondary to his right knee total arthroplasty with significant limping. Although he had pre-existing degenerative chondormalacia of the left knee, I do believe his symptoms have significantly accelerated due to his

> right knee industrial injury and he has developed significant left knee pain.

CX 2 at 25.

However, Dr. Kharrazi's report does not mention that Claimant participated in line dancing, karate or motorcycle riding and it is not clear if the doctor was made aware that the Claimant participated in these activities. See CX 2. Also the report says that Claimant related to Dr. Kharrazi that he first began feeling pain in his left knee around January of 2003 and that he attributed this pain to his favoring his left knee after the right knee surgery. CX 2 at 20. This date contradicts Claimant's earlier testimony that his left knee began hurting him as early as 1999. Dr. Kharrazi's 2003 report also fails to indicate that he reviewed medical records from before 2003. I find that Dr. Kharrazi's opinion on this issue is less credible because he did not review the entire left knee medical history and was unaware of the Claimant's activities outside of work which may have aggravated his left knee condition rather then the use of a walker, cane or the altered gait following the right knee surgery.

There is little in the way of objective evidence to support a finding that Claimant's altered gait from the right knee surgery aggravated or caused Claimant's left knee condition. Claimant's own doctor, Dr. Hajj, admitted that there was no significant difference between the x-rays of Claimant's left knee before the surgery (January 2001) and those taken nearly a year after the surgery (November 2002[13]). EX 19 at 494. Dr. Hajj tried to explain how arthritis can advance without revealing degenerative changes on an X-ray stating that "when the arthritis is advanced…I don't think you are going to see that much difference in six months or even a year on the x-ray… so you just have to go with the patient's symptoms." *Id.*

However, if this last statement were true and the left knee was aggravated by the Claimant using a walker and suffering an altered gait, then one would not expect to see a sudden worsening between November 2002 and July 2003 but the record does in fact reveal that such a change occurred. Dr. Kang concluded from the January 18, 2001 X-rays that Claimant suffered "[d]egenerative changes in both knee joints consistent with osteoarthritis… Left knee shows *mild to moderate narrowing* of the medial compartment." EX3 at 46 (emphasis added). Dr. Hajj testified that Claimant's left knee X-rays on November 2002 did not reveal any significant changes indicating that the medial compartment narrowing was still mild to moderate. EX 19 at 494. A mere eight months later, Dr. Kharrazi's report concerning X-rays taken on July 7, 2003, described the medial compartment narrowing as "*almost bone on bone*." CX 2 at 25. I find that this evidence shows Claimant's left knee became significantly worse sometime between November 2002 and July 2003. This discredits Dr. Hajj's opinion that Claimant's left knee worsened immediately after the right knee surgery and that it was partly caused by the Claimant's use of a walker and/or cane and resultant altered gait.

Dr. London testified that during the time period that Claimant was using a walker immediately after the right knee surgery, that Claimant's left knee was probably subjected to significantly less stress because Claimant placed almost 50% of his weight on the walker and that Claimant was less active after the surgery and thereby used his left knee less then before the

[13] Dr. Hajj testified that his chart notes reflect a second set of x-rays in November of 2002 and that these x-rays did not reveal a significant difference in the left knee. TR at 66.

surgery. EX 24 at 14. Dr. London felt that Claimant's altered gait was a very "short-strided gait on both sides because he had pain on both sides" and that such a short gait would not have aggravated his left knee. *Id.* I find this testimony to be convincing especially considering the lack of objective evidence to support a finding that Claimant's left knee worsened due to an altered gait or use of a walker or cane following the September 11, 2001 surgery. Dr. London also previously testified that certain "impact loading" activities aggravated arthritis such as "where you jump or you come down hard on your leg, things where you do sudden resistance to your knee like rapid forceful lifting of weights." EX 24 at 28. Whereas I found above that many of Claimant's work activities with Employer had the potential to aggravate Claimant's left knee condition, I do not find the same to be true of Claimant's altered gait and use of a walker/cane following the right knee surgery.

After considering all of the evidence, I find that the record is not sufficient to support a finding that Claimant's left knee injury was aggravated by his altered gait and use of a walker and cane following the September 11, 2001 surgery. These activities were not impact loading, there is no real objective evidence to support a finding that the left knee condition grew worse due to the right knee surgery and lastly neither Drs. Hajj or Kharrazi seem to have concluded that there was a causal link between Claimant's right knee injury and left knee injury until asked about the possibility in 2003 by Claimant's attorney.

Intervening Cause

Employer contends that even if they are found liable for aggravation of Claimant's left knee injury, that Claimant's non-employment activities, including kenpo karate, motorcycle riding, and line dancing, worsened Claimant's left knee condition, thereby severing any liability that they may have had.

The BRB has said that "treatment is compensable even though it is due only partly for a work-related condition." *Turner v. Chesapeake & Potomac Tel. Co.*, 16 BRBS 255, 258 (1984). It is necessary that the employee show that the injury arose only in part from the employment to be compensable. *Brown v. District of Columbia Dept. of Employment Services*, 700 A.2d 787, 792 (D.C.App.,1997)(citations omitted).

The law of intervening causes asks whether the disability is causally related to, and is the natural and unavoidable consequence of, the claimant's work-related accident or whether the subsequent incident constituted an independent and intervening event attributable to the claimant's own intentional conduct, thus breaking the chain of causality between the work-related injury and any disability the employee may be experiencing. *See Hayward v. Parsons Hospital*, 32 A.D.2d 983, 301 N.Y.S.2d 659 (N.Y. 1969). The subsequent disability is still compensable even if the triggering episode is some non-employment exertion like raising a window or hanging up a suit, so long as it is clear that the real operative factor is the progression of the compensable injury, associated with an exertion that in itself would not be unreasonable in the circumstances. *Id.*

None of the Doctors testified that the left knee surgery was not a natural and unavoidable consequence of Claimant's left knee condition. Nor did any of the Doctors testify that

Claimant's ongoing participation in karate, line dancing or motorcycle riding did not constitute an independent cause of Claimant's left knee condition.

Employer offered the testimony of Dr. London. Dr. London watched the tapes of Claimant's sixth degree karate test and testified that similar activities "over time could aggravate the left knee condition." EX 24 at 16-17. However, Dr. London seemingly contradicted himself when he testified that Claimant's activity level may have actually helped his knee condition. EX 24 at 20. He testified that:

> there's a general… belief that if you keep using your knees, you're wearing away at the cartilage in your knees something like you wear away the leather on the bottom of you're shoe; there's a dramatic difference between the cartilage in your knee and the leather… The cartilage is alive and has a capacity – like other musculoskeletal tissues, the cartilage has the ability to respond and actually get stronger to the stresses and strains placed on it… [BUT] cartilage is collagen and the collagen gets more dense and stronger when you exercise. That's true in arthritic joints. It's true in normal joints.

EX 24 at 20.

Dr. London testified that activities such as walking, normal stair climbing, getting into and out of a car, bending often strengthen the knee. EX 24 at 21. He said that impact loading activities such as jumping, cutting, running, changing directions resistance exercise with weights "exceed the limits that arthritic cartilage can tolerate and will aggravate the underlying condition." *Id.* He does however clarify why he opines that karate would aggravate Claimant's left knee. After watching the video, I found that the activities during Claimant's test were more similar to walking and bending over than running or weight lifting. The Claimant did not make any of the kicks typically required to pass the test. The position changes were minimal and did not appear to involve jumping or cutting or running activities.

Other than Dr. London, whose opinion I rejected in the preceding paragraph, there was no testimony that any of Claimant's physical activities were likely independent causes of his left knee condition. As a result, I find that there is insufficient evidence to find that Claimant's karate, motorcycle riding and/or line dancing were independent causes of the Claimant's left knee condition, so as to sever the Employer's liability for the left knee condition and associated medical benefits.

MEDICAL BENEFITS

Section 7(a) of the Act provides in relevant part that the "Employer shall furnish medical, surgical, and other attendance or treatment […] for such period as the nature of the injury or the process of recovery may require." 33 O.K. § 907(a). In order for medical expenses to be assessed against an employer, the expense must be both reasonable and necessary. *Pernell v. Capitol Hill Masonry*, 11 BRBS 532, 539 (1979). Reasonable and necessary medical expenses are those related to and appropriate for the diagnosis and treatment of the industrial injury. 20

C.F.R. § 702.402; *Pardee v. Army & Air Force Exchange Serv*., 13 BRBS 1130, 1138 (1981). A claimant establishes a prima facie case for compensable medical treatment where a qualified physician indicates treatment was necessary for a work-related condition. *Turner v. Chesapeake & Potomac Tel. Co.*, 16 BRBS 255, 257-58 (1984). Claimant carries the burden to establish the necessity of such treatment rendered for his work-related injury. See generally Schoen v. U.S. Chamber of Commerce, 30 BRBS 112 (1996); *Wheeler v. Interocean Stevedoring Inc*., 21 BRBS 33 (1988).

As I find that there was no intervening cause and medical benefits are never time barred, Employer is responsible for all reasonable and necessary medical expenses stemming from the work-related left knee injury.

Dr. Johnson's June 4, 2002 letter referenced that Claimant would soon need left knee replacement surgery. EX 10 at 135-36. Dr. Hajj testified that he believes Claimant needs a partial or total left knee arthoplasty in the near future as all other conventional medical treatment has not worked. EX 19 at 485-6. Dr. London testified that such an arthroscopic surgery would be a waste of time. EX 24 at 23. Specifically he stated that "[t]he chances of him benefiting from that surgery are slim to none. Once an individual gets down to a 2-millimeter joint space, with areas of exposed bone on bone contact this surgery is a waste of time." *Id.* Dr. London also indicated that Claimant may need a total knee replacement but that the timing of such would be left to Claimant in so far as the doctors wait to see how long Claimant can still function before resorting to such a surgery. EX 24 at 245.

CONCLUSION

I find that Claimant's claim for disability is time barred under Section 12 because he gave Employer late notice which was not excused under Section 12(d). I find that the Section 13 statute of limitations was tolled under Section 30(f). I also find that Claimant's left knee injury was aggravated or accelerated by his work activities while with Employer. I further find that there is insufficient evidence on which to conclude that Claimant's left knee was aggravated during the time he was recovering from the work-related right knee surgery. Since medical benefits are never time barred, I find that Employer is liable for reasonable medical expenses in regards to Claimant's left knee including past expenses and future expenses including a left knee arthroplasty.

ORDER

Based on the foregoing findings of fact and conclusions of law, **IT IS HEREBY ORDERED** that:

1. Employer shall provide such reasonable medical treatment in regards to Claimant's left knee including past expenses and future expenses including a left knee arthroplasty and as described in the decision above.

2. Interest at the rate specified in 28 U.S.C. § 1961 in effect when this Decision and Order is filed with the OWCP shall be paid on all accrued benefits computed from the date each payment was originally due to be paid.

3. The District Director shall make all calculations necessary to carry out this Order.

4. Counsel for Claimant shall within 20 days after service of this Order submit, to counsel for Employer and to the undersigned Administrative Law Judge, a fully supported application for costs and fees reduced by half (50%) for partially prevailing as to recovery of Claimant's medical expenses. Within 20 days thereafter, counsel for Employer shall provide Claimant's counsel and the undersigned Administrative Law Judge with a written list specifically describing each and every objection to the proposed fees and costs. Within 20 days after receipt of such objections, Claimant's counsel shall verbally discuss each of the objections with counsel for Employer. If the two counsel disagree on any of the proposed fees or costs, Claimant's counsel shall within 15 days file a fully documented petition listing those fees and costs which are still in dispute and set forth a statement of Claimant's position regarding such fees and costs. Such petition shall also specifically identify those fees and costs which have not been disputed by counsel for Employer. Counsel for Employer shall have 15 days from the date of service of such application in which to respond. No reply will be permitted unless specifically authorized in advance.

IT IS SO ORDERED.

A

Gerald Michael Etchingham
Administrative Law Judge